Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Public Notice on Interpretation	)	MB Docket No. 12-83
of the Terms "Multichannel Video	)	
Programming Distributor" and "Channel"	)	
as Raised in Pending Program Access	)	
Complaint Proceeding	)	

To: Chief, Media Bureau

REPLY COMMENTS OF CBS CORPORATION

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June 13, 2012

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PRELIMINARY STATEMENT

CBS Corporation ("CBS") respectfully submits these reply comments in the above docket, in which the Media Bureau ("Bureau") has invited comment on whether online video distributors (OVDs) meet the Communications Act's definition of a "multichannel video programming distributor" ("MVPD").

Although this question has arisen in the context of a complaint under the FCC's program access rules, both the Bureau and parties filing initial comments recognize that it has legal and policy implications that may extend far beyond the instant proceeding.[1] The issue is of particularly crucial importance to broadcasters, since exempting Internet program distributors from the rules governing MVPDs – most importantly, the requirement of obtaining a television

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1 *Public Notice, Interpretation of the Terms "Multichannel Video Programming Distributor" and "Channel" as Raised in Pending Program Access Complaint Proceeding*, MB Docket No. 12-83, Release No. DA 12-507 (rel. March 30, 2012) at ¶ 1 (hereafter "*Notice*"); Comments of National Association of Broadcasters, MB Docket No. 12-83 at 1 (May 14, 2012); Comments of ABC Television Affiliates Association, CBS Television Network Affiliates Association, and NBC Television Affiliates, MB Docket No. 12-83 at 1 (May 14, 2012) (hereafter "Comments of Network Affiliates") .

broadcaster's consent before retransmitting its signal – would not only threaten to upend a carefully-crafted regulatory scheme, but could materially affect a revenue stream important to television broadcasting.

One need look no farther than daily reports in both the trade and general press to see what is involved.[2] The rise of the Internet has opened to consumers avenues of information and entertainment – not least of all exponentially increased sources of video programming – that were scarcely imaginable when the regulations here in question were first adopted. But along with the unprecedented bounty of content made available by the Internet, digital technology has offered new opportunities to free-riders who seek to exploit the intellectual property of others for their own financial gain. These parties see in technological advance an opportunity to defeat the purpose and intent of laws fashioned in another era by finding loopholes in their application to digital program distribution.

Thus online distributors of video programming have already made the claim that they are "cable systems" for purposes of the compulsory copyright license provided by Section 111 of the Copyright Act[3] – thereby sparing them the necessity of negotiating a copyright license with the

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2 *See, e.g.,* Cristopher S. Stewart and Merissa Marr, "High Noon for Diller's Aereo," *Wall Street Journal*, May 24, 2012; Katy Bachman, ""Broadcaster, Aereo to Face Off Next Week Over Copyrights: Stakes are high for preserving broadcast business model," *Adweek,* May 23, 2012; Ted Johnson, "Local TV stations still fighting streaming services," *Variety*, April 30, 2012; "Online Video Streaming Service Says Service Still on Track Despite Lawsuits, *Communications Daily,* March 5, 2012; "Ivi TV Sees Promise in Copyright Act, Section 111 in the Courts ," Brian Stelter, "Judge Issues Injunction Against Video Start-Up," *New York Times,* February 23, 2011; Matt Jarzemsky, "Streaming Upstart is Blocked by a Judge," *Wall Street Journal*, November 24, 2010; *Communications Daily,* September 27, 2010.

3 *See, WPIX, Inc. v. ivi, Inc.*, 765 F. Supp. 2d 594 (S.D.NY. 2011), *appeal docketed*, No. 11-788 (2d Cir. Mar. 1, 2011) (hereafter "*WPIX v. ivi*"). Oral argument on appeal from the issuance of a preliminary injunction in this case was heard before the U.S. Court of Appeals for the Second Circuit on May 30, 2012.

owners of the programming carried on broadcast signals – while at the same time citing the preliminary *Sky Angel* decision here in issue for the proposition that they are not "MVPDs" under the Communications Act – and thus do not have to obtain consent to retransmit those signals from the broadcasters that originate them.[4] In both cases, their convenient reading of the law would result in their being able to avoid the necessity of meaningfully compensating those whose investment and effort creates television programming and makes it available to viewers. Their business plan is simple: have broadcasters and copyright owners bear the costs of creating and producing television programming, and then reap the profits from reselling it.

To date, this scheme has not been successful. Both the United States Copyright Office[5] and the courts[6] have unequivocally held that Internet video distributors are not "cable systems" entitled to the compulsory license afforded by Section 111. Accordingly, several parties undertaking the unauthorized distribution of broadcast signals over the Internet have been stopped by the issuance of preliminary injunctions.[7]

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4 *See, e.g.,* Defendants' Memorandum in Support of Motion to Stay Preliminary Injunction Pending Appeal, *WPIX, Inc. v. ivi, Inc.,* Docket No. 10 Civ. 7415 (NRB), at 13-14.

5 *See*, U.S. Copyright Office, "A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals" (August 1, 1997) at 97; Statement of Marybeth Peters, Register of Copyrights, *Copyrighted Broadcast Programming on the Internet*, before the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary, 106th Cong (June 15, 2000) ("Peters Statement"); Register of Copyrights, Satellite Home Viewer Extension and Reauthorization Act, Section 109 Report, at 181-88 (2008); Register of Copyrights, Satellite Television Extension and Localism Act, Section 302 Report, at 48 (2011).

6 WPIX Inc. v. ivi, Inc., supra; CBS Broadcasting, Inc. v. FilmOn.com, Inc., No. 10-cv-07532 (S.D.N.Y. Nov. 22, 2010); see also Twentieth Century Fox Film Corp. v. iCraveTV.com, 2000 U.S. Dist. LEXIS 11670 (D. W.Pa. 2000).

7 *See* note 6, *supra.*

Thus copyright law prevents the unauthorized retransmission of television broadcast signals online, providing an effective first line of defense against free riders. That fact, in CBS's view, does not alter the significance of this proceeding for broadcasters. However clear existing copyright law is in this regard, the FCC should not adopt an interpretation of "MVPD" that would potentially allow the online retransmission of a television signal without the broadcaster's consent.

As both the *Notice* and the initial comments in this proceeding show, there is nothing in the definition of "multichannel video programming distributor" in the Communications Act that compels an interpretation of that phrase that would defeat the clear intent of Congress that broadcasters be able to negotiate compensation for the retransmission of their signals. Rather than adhering to a highly technical interpretation of what it means to "make[ ] available for purchase . . . multiple channels of video programming"– an interpretation that is not only at odds with everyday understanding but that would read out of the definition several types of distributors that the statute expressly cites as examples of an "MVPD"– the Bureau should construe the term in a manner that comports both with congressional purpose and common sense. It should, in short, recognize that, for purposes of the Communications Act, an OVD is an MVPD.

DISCUSSION

DEFINING OVDs AS MVPDs IS WHOLLY CONSISTENT WITH THE PLAIN LANGUAGE OF SECTION 2 (c) OF THE 1992 CABLE ACT. THE BUREAU SHOULD ACCORDINGLY INTERPRET "MULTIPLE CHANNELS OF VIDEO PROGRAMMING" IN A WAY THAT WILL NOT UNDERMINE THE CLEAR INTENT OF CONGRESS THAT BROADCASTERS BE ABLE TO NEGOTIATE COMPENSATION FOR THE RETRANSMISSION OF THEIR SIGNALS.

In the program access complaint that gave rise to this proceeding, complainant Sky Angel U.S., LLC, an Internet program distributor, sought a standstill order under the FCC's program access rules preventing Discovery Communications, LLC, from terminating an affiliation agreement pursuant to which it was providing complainant with a number of program networks. The Media Bureau denied the standstill order, finding that Sky Angel had failed to demonstrate a likelihood of success in establishing that it was an MVPD entitled to invoke the rules. *In re Sky Angel U.S., LLC,* 25 FCC Rcd 3879 (2010) (hereafter "*Standstill Denial Order*").

In reaching its decision, the Bureau focused on a portion of the definition of a "multichannel video programming distributor"– originally enacted as part of the 1992 Cable Act – that described an MVPD as "a person . . . who makes available for purchase, by subscribers or customers, *multiple channels of video programming.*"[8] Citing a provision of the

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[8] *See,* P.L. 102-385, § 2(c), 106 Stat. 1463, codified at 47 USC § 522 (13) (emphasis added). The entire definition states that

> the term "multichannel video programming distributor" means a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.

Cable Communications Policy Act of 1984,[9] which defined "channel" as "a portion of the electromagnetic frequency spectrum which is used in a cable system, "[10] the Bureau tentatively concluded that the requirement that an MVPD make available "multiple channels of video programming" to its customers referred not only to *program networks,* but also to a "transmission path" to the subscriber. Since Sky Angel had not shown that it provided such a transmission path to its subscribers, the Bureau concluded that it had failed to establish a likelihood of success on the issue of whether it was an MVPD.

As the *Notice* and various commenters point out, there are several problems with this analysis.

First, in interpreting the meaning of "multichannel video programming distributor" – a term having its origin in the 1992 Cable Act – the Bureau heavily relied on a technical definition of the word "channel" adopted eight years earlier in the 1984 Cable Act. When used in the context of defining the "multiple channels of video programming" that an MVPD must "make[ ] available for purchase[ ] by subscribers or customers," the 1984 definition does not make sense. By no description does an MVPD make available "portion[s] of the electromagnetic frequency spectrum" for purchase by its subscribers.

Further, the provision of the 1984 Cable Act on which the Bureau relied defines "channel" as "spectrum *which is used in a cable system.*" Taken literally, this reference to "cable system" reads out of the MVPD definition several non-cable distribution systems that the 1992

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9 Pub. L. No. 98-549, § 2, 98 Stat. 2779 ("1984 Cable Act").

10 47 USC § 522 (4).

Cable Act expressly cites as *examples* of a "multichannel video programming distributor" – distribution systems such as an MMDS service, a DBS service, or a television receive-only satellite program distributor.[11]

There is thus little to support the strained reading of "multiple channels of video programming" that the Bureau adopted in the *Standstill Denial Order*.[12] But even apart from the inconsistency of the Bureau's interpretation with an everyday understanding of the language in question, its hyper-technical construction is drastically at odds with Congress' purpose in adopting the retransmission consent provision of the 1992 Cable Act.

The legislative history of the 1992 Cable Act plainly reveals the intent of Congress that broadcasters have the opportunity to consent to – and seek compensation for – the retransmission of their signals by any person or entity, whatever its nature. Describing a prior FCC interpretation that cable systems did not fall within an earlier statutory prohibition against the unauthorized "rebroadcast" of any part of a station's programming by another "broadcasting

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11 *See* note 8, *supra*..

12 The *Notice* refers to an isolated allusion in the legislative history of the 1992 Cable Act to Congress' intention to promote "facilities-based" competition in the video distribution market. *Notice* at ¶ 8, citing H.R. Rep. No. 102-862 (1992) (Conf. Rep.) at 93. The Commission requests comment on Congress' meaning in using this phrase, and asks whether excluding entities like Netflix and Hulu Plus that offer programming, but do not provide "facilities," from the definition of "MVPD" – and thus denying them the ability to invoke the program access rules – may have an adverse effect on competition.

CBS believes, in the first instance, that a stray and cryptic reference to "facilities-based" competition in a legislative record comprising hundreds of pages should not be given weight in determining the meaning of "multiple channels of video programming," a phrase the meaning of which seems, on its face, to be quite clear. *See,* Comments of Network Affiliates at 12-13. At the same time, we do not think that subscription video-on-demand services such as Netflix and Hulu, which do not offer *linear* channels of video programming, should be considered MVPDs. Such services barely existed when the 1992 Cable Act was enacted – certainly not on the Internet – and their inclusion in the MVPD rubric would be inconsistent with general industry understanding. As for any possible adverse effect on competition from denying such entities the ability to invoke the program access rules, even if consumers would tolerate interference with such popular services by their Internet Service Providers – which is highly doubtful – other legal avenues exist to protect against alleged anticompetitive conduct. *See*, Thomas Catan and Amy Schatz, "U.S. Probes Cable for Limits on Net Video," *The Wall Street Journal,* June 13, 2012, p.1.

station," the Senate Commerce Committee emphasized that Congress' intent had always been "to allow broadcasters to control the use of their signals by *anyone* engaged in retransmission *by whatever means*."[13] The exception created for cable systems by the FCC's literalistic interpretation of the existing statutory language, the Committee concluded, had "created a distortion in the video marketplace which threatens the future of over-the-air broadcasting."[14] Thus the purpose of the amendments to Section 325 of the Communications Act adopted in 1992 was to "close a gap in the retransmission consent provisions" that unfairly created a situation "under which broadcasters in effect subsidize the establishment of their chief competitors."[15]

The advent of the digital era has created new potential competitors to broadcasting that may count among their advantages having infinitesimal capital start-up costs when compared to cable and satellite providers. The Bureau should not, by a strained and unnecessary interpretation of the statutory definition of MVPD, recreate a situation in which broadcasters must again subsidize those competitors by the uncompensated retransmission of their signals.

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13 Senate Report 102-92 at 35-36 (emphasis added).

14 *Id.*

15 *Id.*

CONCLUSION

For the reasons stated above, the Bureau should determine that online video distributors are MVPDs as defined by Section 602 of the Communications Act, 47 USC § 522 (13).

Respectfully submmitted,

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